INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

CASES:

Altman, Ex parte, 34 F. Supp. 106	3
Fahey, Ex parte, 332 U.S. 258	6
I.C.C. v. *United States*, 289 U.S. 385	6
Roche v. *Evaporated Milk Assn.*, 319 U.S. 21	6
U. S. Alkali Assn. v. *United States*, 125 U.S. 196	6
United States v. *Benz*, 282 U.S. 304	4
United States v. *Mayer*, 235 U.S. 55	5
United States v. *Rice*, 327 U.S. 742	6
Whitney v. *Dick*, 202 U.S. 132	6

MISCELLANEOUS:

Federal Rules of Criminal Procedure:	
Rule 45(c)	5
Rule 57(b)	5
Rules of District Court, N. D. Cal.	3

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 466

JOHN A. MALONE AND ELEANOR F. DANA,
Petitioners

v.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

There was no opinion below.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1952 (R. 14). The petition

for a writ of certiorari was filed on November 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in denying petitioners' motion for leave to file a writ of prohibition to restrain further proceedings against them under an indictment on the ground that the trial court had lost jurisdiction by granting a pretrial motion to dismiss the indictment and was thereafter without power to enter, within the same term, an order vacating the dismissal.

STATEMENT

On October 28, 1952, petitioners filed a motion in the Court of Appeals for the Ninth Circuit for leave to file a petition for a writ of prohibition (R. 1).

According to the petition (R. 7-13), on February 13, 1952, petitioners and an alleged corporation were indicted in the Northern District of California on a charge of conspiracy to defraud and commit offenses against the United States in violation of 18 U.S.C. 371 (R. 7, par. III). Petitioners filed a motion to dismiss the indictment, and a motion to quash the service with respect to the alleged corporate defendant (R. 8, par. V). On April 17, 1952, Judge Louis E. Goodman dismissed the indictment (R. 8, par. VI).

The following day, the Government filed a motion for rehearing, praying that the dismissal order be vacated. Petitioners appeared specially and objected to any further proceedings in the case on the ground that the court had been divested of jurisdiction by the dismissal order. (R. 9, par. VII.) On May 16, 1952, which was within the same term of court in which the dismissal order was entered,[1] Judge Goodman vacated the dismissal order, denied petitioners' motion for dismissal, and granted the motion to quash as to the corporation. In the vacating order, Judge Goodman stated, *inter alia,* that the indictment adequately charged a conspiracy and that he was "now satisfied that the previous order [was] erroneous and that the court [had] power to correct it," citing *Ex parte Altman*, 34 F. Supp. 106 (S.D. Calif.). (R. 9-10, par. VIII.)

On October 14, 1952, pursuant to a notice to appear for the taking of pleas (R. 10, par. IX), petitioners again appeared specially and objected to any further proceedings in the case on the ground that the court had lost jurisdiction by the dismissal order. Respondent Harris, as judge of the master calendar, overruled the objection and continued the case until October 30, 1952, for the

[1] The Rules of the United States District Court for the Northern District of California provide that "Terms of this Court shall be held at San Francisco commencing on the first Monday in March, the second Monday in July and the first Monday in November of each year."

entry of pleas. In this connection, Judge Harris stated that the case would proceed to trial unless please of guilty were entered. (R. 11, par. X.)

The proposed petition for a writ of prohibition also stated that, since no appeal lay from the order vacating the dismissal order, petitioners were without an adequate remedy at law and would be subjected to the expense and vicissitudes of a trial in violation of their constitutional rights, unless respondents were restrained by the Court of Appeals (R. 12-13, par. XII). The petition concluded with a prayer for an "alternative Writ of Prohibition" restraining respondents from taking additional steps incident to the case until further notice from the Court of Appeals and for an order to respondents to show cause why they should not be absolutely barred from further proceedings under the indictment (R. 13).

The Court of Appeals denied the motion for leave to file the petition (R. 14).

ARGUMENT

1. There is no merit in petitioners' contention that the District Court was without power to vacate its order dismissing the indictment and to reinstate the cause for trial. It was well established at common law that during the same term all judgments or orders were "deemed to be 'in the breast of the court' making them, and subject to be amended, modified, or vacated by that court." *United States* v. *Benz*, 282 U.S. 304, 306-307. This

power was not during term time limited to correction of clerical errors; the question whether a mere clerical error was involved became significant only if a change was sought after the term had expired. *United States* v. *Mayer*, 235 U.S. 55, 67.

Nothing in the Rules of Criminal Procedure indicates an intention to deprive District Courts of this long recognized power to reconsider a judgment or order. Rule 57(b) provides that where, as here, "no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or any applicable statute." The abolition by Rule 45(c)[2] of the term as a measure of the time for taking action certainly does not have the effect of depriving the courts of their established power to reconsider a decision. Where, as here, the rules of the District Court do not provide a fixed period for petitions for rehearing, it may be either that the old term rule still applies, or that the motion must be brought within a time reasonable under all the circumstances. There is no necessity in this case to consider the possible time limitations. The motion for rehearing here involved was filed the day after the order of dis-

[2] "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding."

missal was entered, and within the same term of court. The application was, therefore, clearly timely.

2. In any event, the denial of the motion for leave to file the petition for a writ of prohibition was obviously proper. Even where jurisdictional objections are raised, the granting of the common law writs of certiorari, mandamus, and prohibition is always discretionary, never mandatory. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *U. S. Alkali Assn.* v. *United States*, 325 U.S. 196. "As extraordinary remedies, they are reserved for really extraordinary causes" (*Ex parte Fahey*, 332 U.S. 258, 260); they are never to be utilized as a substitute for an appeal or a writ of error (*I.C.C.* v. *United States*, 289 U.S. 385, 394). Notwithstanding the existence of jurisdictional questions, "Where the appeal statutes establish the conditions of appellate review [such as 28 U.S.C. 1291, prohibiting appeals except from final orders], an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases." *Roche* v. *Evaporated Milk Assn.*, *supra*, at p. 30; see also, *Whitney* v. *Dick*, 202 U.S. 132, 140; cf. *United States* v. *Rice*, 327 U.S. 742. The inconvenience of a trial, even though it is anticipated that it will be long and

costly, will not justify the writ. *Ro*
rated Milk Assn., supra, pp. 30, 31;
v. *United States, supra,* pp. 202-203. *oche* v. *Evapo-*
here presented is not "extraordina; *U. S. Alkali*
volves merely the propriety of a . The question
ruling in a type of case where the co ary", but in-
has jurisdiction. The order vaca trial court's
missal order would be reviewable on urt ordinarily
a final judgment, if one should be obt ating the dis-
petitioners. Since the only reason f n appeal from
the issuance of a writ is to avoid th tained against
expense of a trial, the Court of Appe they urge for
have been justified in granting the ne trouble and
eals would not
motion.

CONCLUSION

For the foregoing reasons, it is s respectfully
submitted that the petition for a writ t of certiorari
should be denied.

WALTER J. CUMM
Solicitor Genera MINGS, JR.,
CHARLES B. MURP *al.*
Assistant Attor RAY,
BEATRICE ROSENBE *rney General.*
KENNETH C. SHEL ERG,
Attorneys. LVER,

JANUARY, 1953.

☆U. S. GOVERNMENT PRINTING OFFICE 1

1953—236843/P.O.933